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previously stated, other methods of obtaining information concerning rentals were ignored by Plaintiff, but this Court may not be so oblivious to the economic facts of life. It is a fact that Defendant sells more newspapers than other newspapers published in certain areas of the State of Rhode Island. This fact is a considerable step away from the bald unsupported conclusion asserted by Plaintiff that, therefore, it possesses monopoly power with respect to renter information.

Plaintiff's Complaint is denied and dismissed. Judgment will enter for Defendant Providence Journal Company for costs.

SO ORDERED.



M. B. SCHNAPPER et al.

v.

William E. FOLEY et al.

Civ. A. No. 77-2119.

United States District Court,
District of Columbia.

June 8, 1979.

Suit was brought for injunctive and declaratory relief with respect to copyrighting of films commissioned by government. The District Court, John Lewis Smith, Jr., J., held that: (1) since only relief sought against federal defendants was to order them to perform or refrain from performing in their official capacities, the action was in reality against the United States and, in absence of any statute authorizing an injunction against United States, claims for injunctive relief must be dismissed for lack of jurisdiction; (2) Administrative Office of United States Court lawfully determined that private producer of films for Judicial Conference of United States should have copyright, and (3) government agen-

cy's input as to contents of films did not constitute federal control of films prepared for use on public television, even though the series was broadcast on public television stations.

Motion to dismiss granted.

1. Injunction ⇐75

Injunctive relief is not available against a sovereign unless statutory authority exists.

2. United States ⇐125(3)

United States must give its consent to be sued, even though suit is nominally against federal officer, where relief sought would actually be against the government.

3. Injunction ⇐75

Since only relief sought against federal defendants was to order them to perform or refrain from performing in official capacities, the action was in reality against the United States and, in absence of any statute authorizing an injunction against United States, claims for injunctive relief must be dismissed for lack of jurisdiction.

4. Copyrights and Intellectual Property ⇐41.1

Since Administrative Office of United States Courts was not in business of making movies, where it entered into contract with private party to produce for Judicial Conference of United States five films about Supreme Court and determined that the private party should have copyright in the films, the copyright issued was lawful under statute allowing government agency to determine whether to allow independent contractor to secure copyright in works prepared with government funds. 17 U.S.C.A. § 105. X

5. Copyrights and Intellectual Property ⇐10.3

Copyright to film series commissioned by federal government was not unconstitutional, despite contention that copyright fostered government censorship. 17 U.S.C.A. § 105. X

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6. Constitutional Law ⇐ 90.1(1)

Copyrights and Intellectual Property
⇐ 2

There is no conflict between First Amendment and copyright laws. U.S.C.A. Const. Amend. 1.

7. Constitutional Law ⇐ 90.1(9)

Where film series was commissioned by federal government for use at Judicial Conference of United States and was not prepared as original television broadcast, government agency's input as to contents of film did not constitute federal control of films prepared for use on public television in violation of Constitution, even though the series was broadcast on public television stations. U.S.C.A. Const. Amend. 1.

Seymour S. Guthman, George R. Douglas, Jr., Washington, D. C., for plaintiffs.

Thomas J. Byrnes, Dept. of Justice, Washington, D. C., Theodore D. Frank, Washington, D. C., Alan Latman, New York City, for defendants.

OPINION

JOHN LEWIS SMITH, Jr., District Judge.

Plaintiff M. B. Schnapper, Editor of Public Affairs Press, seeks both injunctive and declaratory relief in this action. He requests an injunction which would 1) invalidate a copyright to a film series commissioned by the government, 2) prohibit future copyrights in similar works, and 3) prohibit heads of federal agencies from entering into future contracts for production of works which either call for copyrighting of such works or for any exercise of control over the contents of such works. Plaintiff also seeks a declaratory judgment that 1) all works produced with funds provided by an agency of the United States may not be copyrighted, 2) all such past, present, and future copyrights are null and void, and 3) any contract between an agency and a private party authorizing an agency or official of the United States to exercise any control over the content of any such works is null

and void. Defendants are William E. Foley, Director of the Administrative Office of the United States Courts; Barbara H. Ringer, Register of Copyrights; Public Broadcasting Service, a District of Columbia Corporation; Metropolitan Pittsburgh Public Broadcasting, Inc., Station WQED, Pittsburgh, Pennsylvania; and Greater Washington Area Educational Telecommunications Association, Inc., Station WETA, Washington, D. C. The matter is before the Court on defendants' motions to dismiss.

[1-3] Injunctive relief is not available against the sovereign unless statutory authority exists. The United States must give its consent to be sued, even though the suit is nominally against an officer, where the relief sought would actually be against the government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Lloyd Wood Const. Co. v. Sandoval*, 318 F.Supp. 1167 (D.Ala.1970). This action is in reality against the United States since the only relief sought against the federal defendants is to order them to perform or refrain from performing certain acts in their official capacities.

The United States is immune from suit except under those circumstances and conditions under which it has consented to be sued. *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Here plaintiff has not alleged a claim for money damages, and there is no statute authorizing an injunction against the United States. *Anderson v. United States*, 229 F.2d 675 (5th Cir. 1956); *Larson v. Domestic & Foreign Commerce Corp.*, *supra*; *Belknap v. Schild*, 161 U.S. 10, 16 S.Ct. 443, 40 L.Ed. 599 (1896). Therefore, the claims for injunctive relief must be dismissed for lack of jurisdiction.

[4] Plaintiff contends that the copyright in issue is unlawful in that no copyright can be obtained in a work produced with the aid of government funds. 17 U.S.C. § 105 states that copyright protection is not available for any work of the United States

} USG funds

Government. A government work is defined in 17 U.S.C. § 101 as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." See, also, *Public Affairs Associates v. Rickover*, 268 F.Supp. 444 (D.D.C.1967). However, this particular work was not created by government employees as part of their official duties. The Administrative Office of the United States Courts entered into a contract with a private party to "produce for the Judicial Conference of the United States five films about the Supreme Court entitled 'Equal Justice Under Law.'"

The legislative history of 17 U.S.C. § 105 indicates that Congress recognized there would be many of these "contract" or "commission" cases where denial of copyright protection would be unfair or hamper the publication and production of important works. It, therefore, allowed the government agency concerned to determine whether to allow an independent contractor or grantee to secure a copyright in works prepared with government funds. The

House Report further provides that where a government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld.

These films certainly were not commissioned by the Administrative Office of the United States Courts as an alternative to having one of its own employees prepare the work. That agency is not in the business of making movies. Here, as intended by Congress, the agency determined that the private parties should have a copyright in the films. Consequently, the copyright issued to the series is lawful under 17 U.S.C. § 105.

[5] Plaintiff also argues that the copyright in question is unconstitutional because such copyrights foster government censorship. The legislative history of the copyright law shows that, on the contrary, Congress refused to prohibit copyrights in government funded works because such a prohibition might hamper distribution.

H.R.Rep.94-1476, 94th Cong. 2d Sess. 59 (1976); Sen.Rep.94-473, 94th Cong. 2d Sess. 56, 57 (1975); U.S.Code Cong. & Admin. News 1976 p. 5659. Mr. Schnapper himself testified concerning this point but Congress was not persuaded that copyrights should be denied under such circumstances. *Hearings on S. 597, before the Subcommittee on Patents and Trademarks and Copyrights of the Senate Committee of the Judiciary*, 90th Cong., 1st Sess. 646-650 (part 2) (1967). It is clear from the record that Congress did not feel that such copyrights would foster government censorship.

[6] Plaintiff also alleges that such copyrights are unconstitutional because there is a conflict between the First Amendment and copyrights. In *Sid & Marty Krofft Television v. McDonald's Corp.*, *infra*, the Court expressly held that because copyright protects only the expression of an idea and not the idea itself there is no conflict with the First Amendment. 562 F.2d 1157 (9th Cir. 1977). The court stated that the line between "idea" and "expression of an idea" represents an acceptable definitional balance between copyright and free speech interests. *Id* at 1170. In *Robert Stigwood Group, Ltd. v. O'Reilly*, *infra*, the Court held:

Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud among many others would constitutionally fall.

In the balance must be weighed the constitutional right of authors to have "the exclusive right" to their writings. 346 F.Supp. 376 (D.Conn.1972)

Therefore, it is well established that there is no conflict between the First Amendment and the copyright laws.

[7] Finally, plaintiff contends that the agency input on the contents of the films constituted federal control of films prepared for use on public television and violated the Constitution, citing *Community-Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir.1978). These films were prepared for the Judicial Conference and not as an original television broadcast. In *Community-Service*, the challenged governmental action

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was a statute and regulations adopted thereunder which mandated the public television stations to make and preserve recordings of certain broadcasts. Here the challenged governmental action is a contract voluntarily entered into by both the Administrative Office of the United States Courts and the public television station involved.

The purpose of the statute in *Community-Service* was to effect a form of censorship, and here the intent was the opposite—to make the films as available as possible. It is evident from the foregoing that there is no constitutional violation in this case.

Accordingly, defendants' motions to dismiss are granted.

**Doris FALKENHEINER**

v.

**LEGAL AID SOCIETY OF
BATON ROUGE, INC.**

Civ. A. No. 75-140.

United States District Court,
M. D. Louisiana.

June 8, 1979.

Suit was brought on allegations that illegal sex discrimination occurred when plaintiff, a woman, was not appointed executive director of a legal aid society. The District Court, E. Gordon West, J., held that no sex discrimination was proved.

Judgment for defendant.

1. Civil Rights —44(5)

Evidence failed to support woman's contention that legal aid society was guilty of sex discrimination when it failed to appoint her as its executive secretary. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2.

2. Civil Rights —9.14

It is not sex discrimination for employer to determine that manager, who happens to be female, should not be promoted when that female manager has demonstrated inabilities or inadequacies while interimly placed in very position to which she now seeks appointment.

3. Civil Rights —9.14

Simply because man is chosen over woman is not ground to conclude that sex discrimination is involved, but it is only when employer has based opinion or choice in stereotypical ideas or ideologies, or has chosen lesser qualified male over more qualified female, that allegations of sex discrimination become worthy.

Sylvia Roberts, Baton Rouge, La., for plaintiff.

James D. Thomas, II, Dodd, Barker, Avant, Wall & Thomas, Baton Rouge, La., for defendant.

E. GORDON WEST, District Judge:

This case involves an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

The plaintiff, Doris Falkenheiner, contends that the defendant, Legal Aid Society of Baton Rouge, Inc., on two separate occasions, refused to appoint her as the Executive Director of that agency solely because of her sex. She contends that she was in all respects qualified for the position she sought.

The plaintiff, a licensed attorney, began working for the defendant, Legal Aid Society of Baton Rouge, Inc., in September of 1967 as a staff attorney. In May of 1969 she was appointed to the position of Assistant Director, a position which she held until 1977. During that time, for a three and one-half month period from February 1 to May 15 in 1972, she served as the Acting Executive Director of the defendant agency.